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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 290

BERNARD B. SPINDEL,

Petitioner,

—v.—

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[With Motion Concerning The Record]

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioner, Bernard B. Spindel, prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in this case on February 3, 1967. A motion concerning the record is referred to *infra* in this petition, and is set forth herein following this petition.

Opinions Below

The opinion of the Supreme Judicial Court, printed as Appendix A hereto, *infra,* is reported in —— Mass. ——, 223 N.E. 2d 511. The Superior Court of the Commonwealth of Massachusetts, Hampden County, did not render an opinion as such, but it transmitted to the Supreme Judicial Court a "Report", under the Massachusetts procedure whereby the Superior Court may "report" to the Supreme Judicial Court a case in which the Superior Court is of opinion that there are questions of law so important and

doubtful as to require the decision of the Supreme Judicial Court; said "Report", which was rendered in this case, is printed as Appendix C hereto *infra*.

Jurisdiction

The judgment of the Supreme Judicial Court of Massachusetts was entered on February 3, 1967 (see Judgment or "Rescript", Appendix B hereto, *infra*). By order of Mr. Justice Fortas the time for filing this petition for certiorari has been extended to and including June 23, 1967.

The judgment of the Supreme Judicial Court here sought to be reviewed, affirmed a judgment of the Superior Court of Massachusetts, Hampden County, wherein the petitioner Bernard B. Spindel had been found guilty after a jury trial of the crime of eavesdropping (Mass. Gen. Laws Ann., c. 272, §§99-101, as amended).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), since the petitioner is claiming rights, privileges or immunities under the Constitution of the United States (Fourteenth Amendment due process), and since there is necessarily drawn in question the validity of a State statute (Mass. Gen. Laws Ann., c. 272, §§99-101) on the ground of its being repugnant to the Constitution of the United States.

Possible problems as to whether one aspect of the Federal question of Fourteenth Amendment due process is properly presented, are taken up *infra* in our "Statement of the Case and of How the Federal Questions are Presented", and in the accompanying motion concerning the Record, *infra*.

Questions Presented

Petitioner was convicted of the Massachusetts statutory crime of eavesdropping, on an indictment charge of telephone wiretapping. The telephones involved were in a textile mill whose manager, after advice of counsel that such could be legally done, authorized petitioner to set up the wiretaps so that management might combat suspected pilferage by mill employees. Before setting up the wiretaps petitioner had been informed that such was deemed legal by counsel. The Massachusetts statute involved (Mass. Gen. Laws Ann., c. 272, §§99-101) is at best so ambiguous and uncertain as to whether the Legislature intended to penalize telephone wiretapping of one's own telephone in one's own premises, that the Trial Court considered it proper to refer the question of statutory coverage to the Supreme Judicial Court under the Massachusetts "Report" procedure which is available in certain cases, and the latter Court although affirming the judgment of conviction nevertheless acknowledged that "The eavesdropping statute is not a paragon of clarity. A careful reading of it is required to ascertain what may or may not be done". The questions are:

1. Is the Massachusetts anti-eavesdropping statute here involved so uncertain, unclear, indefinite, vague and ambiguous in its purported coverage of the kind of telephone wiretapping here done—wiretapping by an industrial employer on telephones of its own, on its own premises, to investigate suspected pilferage by employees—as to violate the Fourteenth Amendment due process rule that a State criminal statute which is insufficiently clear, definite and certain to apprise the citizenry of what is forbidden is void on account of vagueness?

2. In relation to question no. 1, above, does not the due process issue become even more acute when, as in this case, the defendant who is prosecuted under the statute thus claimed to be unconstitutionally vague, has acted on advice of counsel that the proposed conduct is legal? (This question is presented on the trial record; a problem exists as to whether it is presented on the record which was before the Supreme Judicial Court under the "Report" procedure; see the herein accompanying Motion, *infra.*)

Constitutional Provisions and Statutes Involved

The case involves the due process clause of the Fourteenth Amendment of the United States Constitution. It also involves Mass. Gen. Laws Ann., c. 272, §§ 99-101, as amended (eavesdropping), and c. 278, § 30 ("Report" procedure); these statutes are quoted in Appendix D hereto, *infra.*

Statement of the Case and of How the Federal Questions are Presented*

Petitioner was convicted in the Superior Court of the Commonwealth of Massachusetts, Hampden County, after a jury trial, on a count of an indictment charging that in

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* The certified record herein consists of the docket entries in the Supreme Judicial Court, the Rescript (Judgment) of that Court, the opinion of that Court, and the "Report" to that Court from the Superior Court, Hampden County. The latter opinion and "Report", which are the essential items in the certified record for consideration by this Court, are printed *infra* as appendices A and C, respectively. As explained *infra*, the "Report" to the Supreme Judicial Court did not include the trial transcript and did not refer to certain items in that transcript which we think ought to be considered by this Court; see our accompanying motion concerning the record, which is printed herein following this petition for certiorari.

the year 1962 at Springfield, Massachusetts, he "did commit the crime of eavesdropping."* He was sentenced to pay a fine of $500.00. The proof at the trial was that William Thal, the chief executive officer of Alamac Knitting Mill, Inc., a textile manufacturer in Springfield, Massachusetts, authorized petitioner Spindel to set up wiretaps on the telephones in the mill leased by the company with a view to detecting suspected pilferage by employees. The tapped telephones involved in the single conviction count herein were all telephones of the company inside the company's premises; the telephones were used by various employees for outside calls as well as intraplant communication. There was evidence at the trial that some of the employees involved did not consent to the monitoring of their telephone conversation, and there was no evidence that any employee consented to such monitoring.

The foregoing facts are all contained in the "Report" from the trial Court to the Supreme Judicial Court.** There was additional evidence at the trial which is contained in the stenographic transcript of the trial but is not mentioned in the "Report", and which we deem important and appropriate for consideration by this Court (see our accompanying motion herein concerning the record, printed following this petition for certiorari). This additional evidence, which is quoted in Appendix E hereto, *infra,* was to the effect that Mr. Thal (the company chief executive) had been advised *in advance* by his own counsel (Edward Cooley, Esq.) that wiretapping of the company's own telephones as here done would be legal; that Mr. Thal had also

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* The indictment is set forth at pp. 5-6 of the "Report", printed in Appendix C hereto, *infra.*

** See further *infra* as to this "Report" procedure; the "Report" is printed as Appendix C hereto, *infra.*

been so advised in advance by the company's independent contractor security officer (Dolan); and that when subsequently (but still prior to the wiretapping) the company's independent contractor security officer or agency (the Dolan-Whitney Agency) brought petitioner Spindel to Mr. Thal to discuss the proposed wiretapping, the parties discussed the legality question and they referred to the fact that they had been advised by counsel that the wiretapping would be legal.

The additional evidence referred to in the last preceding paragraph is deemed by us important for its bearing on the Fourteenth Amendment due process issue of the unconstitutional vagueness of the eavesdropping statute as here applied; see our "Reasons", *infra;* and our accompanying motion concerning the record, *infra.*

After petitioner Spindel's conviction in the Superior Court the case was taken to the Supreme Judicial Court under the Massachusetts procedure whereby the Superior Court may "report" to the Supreme Judicial Court a case in which a jury has rendered a verdict of criminal guilt and in which the Superior Court is of opinion that there are questions of law so important and doubtful as to require the decision of the Supreme Judicial Court (Mass. Gen. Laws Ann., c. 278, § 30). The questions thus reported were (Appendix C hereto, *infra*):

> "(1) Is it lawful to tap a wire to intercept telephone communications in a building when authorized by and done with the consent of the owner or persons in control of the building but without a court order issued in accordance with G.L. c. 272, § 99? (2) Does the language of G.L. c. 272, § 101, meet the standard of clarity and definiteness as to the defendant in this case to satisfy the requirements of *Commonwealth* v. *Slome,* 321 Mass. 713?"

As more fully appears under our "Reasons", *infra*, the Massachusetts anti-eavesdropping statute here involved (Mass. Gen. Laws Ann., c. 272, §§99-101) basically does four things. (1) Section 99 sets up a system for *ex parte* judicial orders permitting electronic eavesdropping including telephone wiretapping. (2) Section 100 makes it a crime to eavesdrop without a Court order under §99. (3) Section 101 makes proof of the installation in any building "of any device or arrangement which may be used for the purpose of violating the provisions of section ninety-nine by listening to any spoken words or proof of the tapping of any wire, unless duly authorized and unless done with the consent of the owner or person in control of the building, * * * prima facie evidence of the commission of the crime of eavesdropping". (4) Section 101 also provides, "but nothing contained in this section or sections ninety-nine and one hundred shall render it unlawful for any person to install and use such a device on premises under his exclusive control".

The Trial Court had instructed the jury that the word "device" appearing in the last clause of section 101 as quoted immediately above, "referred to an electronic device, or a wireless tap or a similar device not involving tapping of a wire to intercept telephone communications" and that this clause did not apply to the tapping of a telephone wire; and the jury were further instructed "that proof of the tapping of any wire shall be prima facie evidence of the crime of eavesdropping, (1) unless duly authorized by a Court order issued in accordance with Section 99 and (2) unless done with the consent of the owner or person in control of the building" (Appendix C hereto *infra*).

There had been no permissive Court order for eavesdropping in this case.

The Supreme Judicial Court, in affirming the judgment of conviction, concluded (Appendix A hereto, *infra*) that the above quoted jury instructions correctly interpreted the legislation; and that

> "* * * The eavesdropping statute is not a paragon of clarity. A careful reading of it is required to ascertain what may or may not be done. Still, we are of opinion that it was not '. . . so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . .' *Commonwealth* v. *Carpenter*, 325 Mass 519, 521."

Reasons for Granting the Writ

We do not dispute that the Massachusetts legislation here involved is exegetically susceptible of the meaning placed upon it by both of the Courts below. But that is not the issue which here needs to be considered, we respectfully contend, in point of the Fourteenth Amendment due process test of unconstitutional vagueness in a criminal statute carrying severe penalties.*

The highest Court of the State has placed its interpretation on this legislation, and that is binding here, so that no purpose will be served by a counter-exegesis on our part to argue that the words of the statute should have been interpreted to allow the telephone wiretapping for which petitioner Spindel has been convicted. The question persists,

* Section 100 of the statute provides for imprisonment for not more than two years or a fine of not more than $1,000, or both.

however, whether it was constitutional under the Fourteenth Amendment to convict petitioner of felonious crime because he was found to have wrongly interpreted this legislation.

The legislation does not even seem to allow for any effective defense on the issue of criminal intent in the sense of willfulness, for §101 makes conviction obtainable on the basis of a prima facie evidentiary operation.

Yet in this very case there exists, as seen, strong and undisputed proof negating any criminal scienter or intent, since the proof is that petitioner was assured by the person in charge of the premises that that person had been assured by his own counsel of the legality of the proposed wiretapping.

In these circumstances—the concession of the Court below that the legislation "is not a paragon of clarity" and that "A careful reading of it is required to ascertain what may or may not be done", the strict evidentiary operation of this criminal statute *via* a prima facie proof provision, and the existence of strong proof not only negating criminal intent but supporting petitioner's claim that competent lawyers and not only laymen were not clearly enough apprised of the meaning of the statute as here ultimately applied—there appears to be presented a compelling case for applying the Fourteenth Amendment ban against criminal statutes which are void on account of vagueness. *Keyishian* v. *Board of Regents,* 384 U.S. 998, 17 L. Ed. 2d 629 (1967); *United States* v. *Laub,* U.S. , 17 L. Ed. 2d 526 (1967).

We repeat, the Fourteenth Amendment vagueness issue ought not to be deemed resolvable against our position

by a technical verbal demonstration that the legislation *can* mean what the Courts below say it means. The Fourteenth Amendment issue is, whether the statutory plan as a whole makes a sufficiently clear differentiation between telephone wiretapping and other electronic eavesdropping to justify the conclusion that the last clause of Section 101 ("but nothing contained in this section or section ninety-nine and one hundred shall render it unlawful for any person to install and use such a device on premises under his exclusive control") makes a likewise sufficiently clear apprisal to the citizenry that the exception ("such a device") is only for the benefit of users of electronic instrumentalities other than telephone wiretapping devices.

The questions presented by this petition for certiorari are of general importance not only because they come within an area of due process policy which this Court has long administered with special solicitude (prevention of criminal punishment under unconstitutionally vague statutes), but also because of the current nation-wide ferment over the problem of where, when and how to allow or not to allow electronic overhearing of conversations. Cf. *Berger* v. *New York,* U.S. S. Ct., October Term 1966, no. 615, decided June 12, 1967, U.S. , 35 U.S. Law Week 4649. It is important to innumerable individuals and businesses throughout the country to know whether they may conduct such electronic activities, including telephone wiretapping, inside their own private premises for their own legitimate security purposes. If States wish to forbid such seemingly proper and legitimate activities, they ought to be required by this Court to do so in the plainest and most unambiguous statutory language.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER,
Attorney for Petitioner
Bernard B. Spindel

ARNOLD C. STREAM
Of Counsel

(Motion concerning the record and appendices to petition follow.)

MOTION CONCERNING THE RECORD

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No.

BERNARD B. SPINDEL,

Petitioner,

—v.—

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

To:

The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The above named petitioner, Bernard B. Spindel, respectfully moves as follows:

In connection with the foregoing petition for certiorari, certain portions of the trial transcript which are not part of the certified record herein, are believed by petitioner to be essential for a proper consideration of his case in this

Court. As noted in the petition for certiorari, this case came before the Supreme Judicial Court of Massachusetts from the Superior Court, Hampden County, under the Massachusetts "Report" procedure (Mass. Gen. Laws. Ann., c. 278, §30—printed in Appendix D to the within petition for certiorari, *infra*). It would appear that under this Massachusetts "Report" procedure all of the trial evidence could have been "reported" to the Supreme Judicial Court. *Ibid; cf. Commonwealth* v. *Segee,* 218 Mass 501, 106 N.E. 173 (1914). The non-"reported" trial evidence to which we refer is the evidence that petitioner Spindel was told *in advance* by the chief executive officer of the textile mill where the wiretapping was to be done that the company's counsel had advised such would be legal. This evidence, which is undisputed, negates scienter or criminal intent on the part of petitioner Spindel, and it is believed to be an important factor in petitioner's favor on the Fourteenth Amendment due process issue of whether the Massachusetts anti-eavesdropping legislation here involved was sufficiently clear and definite in its proscription of the instant wiretapping to meet the test of the rule against unconstitutional vagueness in criminal statutes. In such circumstances it would appear also that the non-"reported" evidence becomes part of the "constitutional facts" which this Court may and should properly consider for a just determination of this case. The trial evidence to which we refer is printed in Appendix E to the within petition for certiorari, *infra.*

It is respectfully prayed that the said trial evidence be received and considered by this Court under an order by way of enlargement of the record, or by such other appropriate order as the Court may determine. If such an order

to receive the additional trial evidence is made, we shall of course obtain and submit proper certified copies of such trial evidence.

Wherefore, it is respectfully prayed that this motion should be granted.

ABRAHAM GLASSER,
Attorney for Petitioner-Movant
Bernard B. Spindel

ARNOLD C. STREAM
Of Counsel

APPENDIX A

Opinion of the Supreme Judicial Court

COMMONWEALTH vs. BERNARD B. SPINDEL

SPALDING, J. A jury found the defendant guilty under an indictment charging the crime of eavesdropping.[1] G.L. c. 272, §§ 99-101, as amended. The judge, being of opinion that there were questions of law so important and doubtful as to require the decision of this court, reported the case, the defendant consenting. G.L. c. 278, § 30.

We summarize the report as follows: In 1962 Alamac Knitting Mills, Incorporated (Alamac) was engaged in the manufacture of textiles in Springfield. Alamac, employing some 800 people, occupied a large mill under a lease of the entire premises from the owner. Early in 1962 it was suspected that employees were pilfering finished materials, and William Thal, Alamac's chief executive officer, sought to ascertain the persons involved and how they operated. He communicated with his security officer (an independent contractor), and it was decided to tap telephones in the mill. At a meeting arranged between Thal and the defendant to carry out this decision, Thal authorized the defendant to place a wire tap on four telephones located in different parts of the mill. Thal also authorized the defendant to place in a desk exclusively used by Thal one or two wire or tape recorders so that conversations on the tapped phones could be recorded and monitored. The defendant

[1] The indictment was tried with another indictment (No. 15, 230) charging Earl E. Jaycox with the same offense and he likewise was found guilty. It was agreed that the decision in the Spindel case would govern the Jaycox case.

completed the wiring and installation of equipment necessary for the telephone monitoring. Thereafter, Thal recorded and monitored conversations emanating from the tapped telephones. The four telephones involved were owned, installed and serviced by the New England Telephone and Telegraph Company and were used by various employees for outside calls as well as intraplant communication.[2] "Evidence was presented that employees involved did not consent to the monitoring of their telephone conversations. There was no evidence that any employee consented to such monitoring."

The jury were instructed that the word "device" appearing in the last clause of G.L. c. 272, § 101, as amended through St. 1956, c. 48, § 4,[3] "referred to an electronic recording device, or a wireless tap or a similar device not involving tapping of a wire to intercept telephone communications" and that this clause did not apply to the tapping of a telephone wire. "The jury . . . (were) further instructed that proof of the tapping of any wire shall be prima facie evidence of the crime of eavesdropping, (1) unless duly authorized by a court order issued in accordance with section 99 and (2) unless done with the consent of the owner or person in control of the building."

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[2] The Commonwealth in its brief states that there was no evidence that the telephone company knew or participated in the acts of the defendant or that the defendant was acting as an employee or representative of the company.

[3] This clause reads "but nothing contained in this section or sections ninety-nine and one hundred shall render it unlawful for any person to install and use such a device on premises under his exclusive control."

The questions reported are these: "(1) Is it lawful to tap a wire to intercept telephone communications in a building when authorized by and done with the consent of the owner or persons in control of the building but without a court order issued in accordance with G.L. c. 272, § 99? (2) Does the language of G.L. c. 272, § 101, meet the standard of clarity and definiteness as to the defendant in this case to satisfy the requirements of *Commonwealth* v. *Slome,* 321 Mass 713?"

1. We are of opinion that the instructions of the judge were correct. Section 101 reads: "Proof of the installation in any building of any device or arrangement which may be used for the purpose of violating the provisions of section ninety-nine by listening to any spoken words or proof of the tapping of any wire, unless duly authorized and unless done with the consent of the owner or person in control of the building, shall be prima facie evidence of the commission of the crime of eavesdropping; but nothing contained in this section or sections ninety-nine and one hundred shall render it unlawful for any person to install and use such a device on premises under his exclusive control." Under this section prima facie evidence of eavesdropping is established by proof of either of two things: (1) the installation of any device or arrangement which may be used for the purpose of violating § 99 by listening to spoken words or (2) the tapping of any wire,[4] "unless duly autho-

[4] The pertinent portions of § 99 as amended through St. 1959, c. 449, § 1, are "Whoever, except in accordance with an order issued as provided herein, secretly or without the consent of either a sender or receiver, overhears, or attempts secretly, or without the consent of either a sender or receiver, to overhear, or to aid, authorize, employ, procure, or permit, or to have any

rized and unless done with the consent of the owner or person in control of the building." The evidence reveals that the defendant placed a wire tap on four telephones within Alamac's premises. Thus we are concerned only with the second situation. On that issue, as stated above, the jury were instructed that proof of the tapping of any wire was prima facie evidence of the crime of eavesdropping unless there were both court authorization and consent of the owner or person in control of the building. This instruction was required by § 101, which puts the prima facie evidence provision into operation upon "proof of the tapping of any wire, unless duly authorized and unless done with the consent of the owner or person in control of the building." It is to be noted that the requirements of court authority and consent of the owner or person in control are stated conjunctively. There was no evidence that any person obtained a court order authorizing the wire taps. There was evidence, however, that Thal exercised control of the knitting mill and consented to wire tapping by the defendant. But that was not enough. The prima facie effect of the evidence could be avoided only by proof also of court authorization.

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other person secretly, or without the consent of either a sender or receiver, to overhear any spoken words at any place by using any electronic recording device, or a wireless tap or electronic tap, or however otherwise described, or any similar device or arrangement, or by tapping any wire to intercept telephone communications, shall be guilty of the crime of eavesdropping and shall be punished by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both.

"such order may be issued and shall be signed by any justice of the supreme judicial or superior court upon application of the attorney general or a district attorney for the district verified by his oath or affirmation that there are reasonable grounds to believe that evidence of crime may thus be obtained."

The defendant's position is that the words "unless duly authorized" in § 101 mean that authority to eavesdrop can be conferred either by a court order issued under § 99 or by permission of a person having exclusive control of the premises where the eavesdropping would take place. Thus, it is argued, since Thal's consent to wire tap had been obtained by the defendant he was "duly authorized," and the judge's charge that there must also be court authorization was erroneous. This contention rests on the premise that the word "device" in the last clause of § 101 ("but nothing contained in this section or sections ninety-nine and one hundred shall render it unlawful for any person to install and use such a device on premises under his exclusive control") embraces the tapping of wires. Doubtless a wire tapping apparatus could be a "device." But to ascertain the meaning of that word in this statute it is necessary to read § 99 (see fn 4), and the earlier provisions of § 101. Under those provisions a distinction is made between electronic recording or similar devices on the one hand and the tapping of a wire to intercept telephone conversations on the other. We are of the opinion that this distinction is preserved in the last clause of § 101 and that the word "device" in that section does not comprehend the tapping of wires.

Moreover if, as the defendant contends, exclusive control of the premises were to confer due authorization to wire tap, then the relevant portion of § 101, as paraphrased, would read: " . . . or proof of the tapping of any wire, unless authorized by the person in exclusive control of the premises and unless done with the consent of the owner or

person in control of the building . . . .'' The second condition (consent of the owner) would become redundant and meaningless under this construction, and we reject that result.

2. The other question reported is whether the language of § 101 satisfies the ''standard of clarity and definiteness'' set forth in *Commonwealth* v. *Slome,* 321 Mass 713. There it was said at page 715, ''A statute creating a crime must be sufficiently definite in specifying the conduct that is commanded or inhibited so that a man of ordinary intelligence may be able to ascertain whether any act or omission of his, as the case may be, will come within the sweep of the statute.'' The eavesdropping statute is not a paragon of clarity. A careful reading of it is required to ascertain what may or may not be done. Still, we are of opinion that it was not '' ' . . . so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . .' '' *Commonwealth* v. *Carpenter,* 325 Mass 519, 521.

3. The entry is to be

Judgment affirmed.

APPENDIX B

Judgment (Rescript) of the Supreme Judicial Court

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON,

February 3, 1967.

In the case of

COMMONWEALTH

vs.

BERNARD B. SPINDEL

pending in the Superior Court for the County of Hampden

ORDERED, that the following entry be made in the docket; viz.,—

Judgment affirmed.

By the Court,

/s/ RICHARD A. McLAUGHLIN,
Clerk.

February 3, 1967

A true copy,

Attest:

RICHARD A. McLAUGHLIN, Clerk
Supreme Judicial Court for the Commonwealth

May 25, 1967

BRIEF STATEMENT OF THE GROUNDS AND REASONS OF THE DECISION:

See opinion on file.

APPENDIX C

Report of the Superior Court

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

HAMPDEN COUNTY.

COMMONWEALTH

v.

BERNARD B. SPINDEL.

REPORT.

I The defendant, Bernard S. Spindel, was indicted on two counts for an alleged violation of G. L. Chapter 272, Section 99, commonly referred to as the "Eavesdropping Statute." The case was tried before a jury together with the case of Commonwealth V. Earl E. Jaycox, Indictment No. 15230, containing the same allegations against Jaycox. It is expressly agreed that the contents of this Report and the decision rendered thereon shall be determinative of the same issues in both cases.

The first count in each indictment alleged that the defendant in 1962 at Springfield did commit the crime of eavesdropping. In the second count of each indictment it was alleged, in substance, that the defendant did secretly and without the consent of either a sender or receiver, overhear

and attempt to overhear spoken words by tapping a wire connected to a semi-public telephone at the Alamac Knitting Mills, Incorporated.

At the conclusion of the Commonwealth's case the Court directed a verdict of "not guilty" on Count 2 of each indictment and allowed the cases to go to the jury on Count 1. The jury returned a verdict of "guilty" in each case and sentences were duly imposed, the execution of which were suspended pending a determination of the issues herein raised.

II In 1962, Alamac Knitting Mills, Incorporated was engaged in the manufacturing of textiles in Springfield, Massachusetts. This corporation employed some 800 people and occupied a large mill under a lease of the entire premises from the owner thereof for the conduct of its business. In early 1962, it was suspected that employees of the corporation were pilfering finished materials, and William Thal, the company's chief executive officer, sought to determine the identity of the employees involved and their method of operation. He communicated with his independent contractor security officer, and it was decided to tap the wires of certain telephones in the mill. A meeting was arranged between Thal and the defendant Spindel to carry out this decision.

At this meeting Thal authorized Spindel to place a wire tap on four telephones located in four different departments of the mill. Thal also authorized Spindel to place in a desk exclusively used by Thal, one or two wire or tape recorders in order that conversations on the tapped phones could be

recorded and monitored. Spindel completed the wiring work and installation of equipment necessary for the telephone monitoring as authorized.

Thereafter, Thal recorded and monitored conversations emanating from the tapped telephones. The four telephones involved were installed, owned and serviced by the New England Telephone and Telegraph Co. and were used by various employees for outside calls as well as intra-plant communication. Evidence was presented that employees involved did not consent to the monitoring of their telephone conversations. There was no evidence that any employee consented to such monitoring.

III The Statute, G. L. C. 272, S. 99 which the Defendant is charged with violating, reads, in part, as follows:

> "Whoever, except in accordance with an order issued as provided herein, secretly or without the consent of either a sender or receiver, overhears, or attempts secretly, or without the consent of either a sender or receiver, to overhear, or to aid, authorize, employ, procure, or permit, or to have any other person secretly, or without the consent of either a sender or receiver, to overhear any spoken words at any place by using any electronic recording device, or a wireless tap or electronic tap, or however otherwise described, or any similar device or arrangement, or by tapping any wire to intercept telephone communications, shall be guilty of the crime of eavesdropping shall be punished. . . .
>
> Such order may be issued and shall be signed by any Justice of the supreme judicial or superior court upon application of the attorney general or a dis-

trict attorney for the district verified by oath or affirmation that there are reasonable grounds to believe that evidence of crime may thus be obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may be thus be obtained shall be final and not subject to review. Said order shall describe or identify (1) The purpose thereof; (2) the location of and the person or persons who are to be so overheard or whose communications are to be so intercepted if known; (3) if telephone communications are to be so intercepted the telephone line, if known; (4) the person or persons who are authorized to so overhear or intercept, or the person or persons under whose supervision such overhearing or interception is to be conducted. . . ."

The particular section in question is Section 101 of Chapter 272 of the General Laws which reads as follows:

1. Proof of the installation in any building of
2. any
3. device or arrangement which may be used for the
4. purpose
5. of violating the provisions of section ninety-nine by
6. listening to any spoken words or proof of the tapping of
7. any wire, unless duly authorized and unless done
8. with
9. the consent of the owner or person in control of the
10. building, shall be prima facie evidence of the commission
11. of the crime of eavesdropping; but nothing contained in
12. this section or sections ninety-nine and one hundred shall

10. render it unlawful for any person to install and use such
11. a device on premises under his exclusive control.

The wording of section 101 is the same as in the corresponding section of the first eavesdropping statute in the Commonwealth, St. 1920 c 558, s3. Section 99, as originally set forth in St. 1920 c 558, s1, read as follows:

> "Whoever, except when authorized by written permission of the attorney general of the commonwealth, or of the district attorney for the district, secretly overhears, or attempts secretly to overhear, or to have any other person secretly overhear, any spoken words in any building by using a device commonly known as a dictagraph or dictaphone, or however otherwise described, or any similar device or arrangement, or by tapping any wire, with intent to procure information concerning any official matter or to injure another, shall be guilty of the crime of eavesdropping and shall be punished by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both."

IV. A question arises as to the interpretation of the words "unless duly authorized" appearing in line 5 and the word "device" appearing in line 11 of section 101.

The jury was instructed that the word "device" referred to an electronic recording device, or a wireless tap or electronic tap or a similar device not involving tapping of a wire to intercept telephone communications and that lines 8 through 11 in section 101 did not apply to the tapping of a telephone wire. The jury was further instructed that

proof of the tapping of any wire shall be prima facie evidence of the crime of eavesdropping, (1) unless duly authorized by a court order issued in accordance with section 99 *and* (2) unless done with the consent of the owner or person in control of the building.

The defendant contends that the words "unless duly authorized" may refer to authority from persons in control of the premises and relate to the clause "unless done with the consent of the owner or persons in control of the building" appearing in lines 5 through 7 and the clause "but nothing contained in this or the two preceding sections shall render it unlawful for any person to install and use such a device on premises under his exclusive control" appearing in lines 8 through 11 of section 101. cf *Commonwealth* v. *Dougherty,* 343 Mass. 299 The general rule is that "penal statutes are to be construed strictly and that they cannot be extended by implication." *Beloin* v. *Bullett,* 310 Mass. 206 at 211 (1941) An individual of ordinary intelligence in the position of the defendant would have difficulty in ascertaining whether or not his conduct in tapping a telephone, when authorized by and done with the consent of the owner or persons in control of the building, was a legitimate exercise of a legal right under G. L. c 272, s 101. *Commonwealth* v. *Slome,* 321 Mass. 713, 715 (1957).

V The defendant desires that I report the case on the following questions of law:

(1) Is it lawful to tap a wire to intercept telephone communications in a building when authorized by and done

with the consent of the owner or persons in control of the building but without a court order issued in accordance with G. L. c 272, s 99?

(2) Does the language of G. L. c 272, s 101 meet the standard of clarity and definiteness as to the defendant in this case to satisfy the requirements of *Commonwealth* v. *Slome*, 321 Mass. 713?

These questions being in my opinion sufficiently important and doubtful, I report them to the Supreme Judicial Court for decision in accordance with G. L. c 278, s. 30.

FREDERICK S. PILLSBURY
Justice, The Supreme Court

Filed July 29, 1966:

INDICTMENT.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, to wit:

At the Superior Court begun and Holden at Springfield, within and for the County of Hampden, for the transaction of criminal business, on the first Monday of August in the year of our Lord one thousand nine hundred and sixty-five

COUNT I. The Jurors of said Commonwealth, on their Oath, present THAT Bernard S. Spindel whose other or true name, if any, to the Jurors aforesaid unknown of New York

in the year nineteen hundred and sixty-two at Springfield, in the County of Hampden aforesaid, did commit the crime of eavesdropping.

COUNT II. And the said jurors further present that Bernard B. Spindel did at Springfield in the year 1962 secretly and without the consent of either a sender or receiver overhear and attempted to overhear spoken words by tapping a wire, to wit: a wire connected to a semi-public telephone at the Alamac Knitting Mills, Incorporated in Springfield aforesaid, to intercept telephone communications without any order of any court as provided in General Laws Chapter 272, Section 99, the said Bernard B. Spindel not then being engaged in the conduct of the business of any corporation subject to the jurisdiction of the Department of Public Utilities of the Commonwealth or the jurisdiction of the Interstate Commerce Commission,

Counts I and II are different descriptions of the same act.

A True Bill:

WILLIAM Y. ALLEN
Foreman.

WALTER JAY SKINNER,
Assistant Attorney General

HAMPDEN, ss. Superior Court.

May Sitting, A. D. 1965 Returned by the Grand Jury and filed by order of Court.

Attest:

EDWARD J. FARRELL
Ass't Clerk

Appendix C—Report of the Superior Court

DOCKET MINUTES.

1965 September 10—Entered. September 14—(1) Appearance, Daniel M. Keyes, Jr. and Edward L. Donnellan for defendant. (2) Appearance, Gerald E. Norman, Special Assistant Attorney General, for the Commonwealth. Pleads not guilty to Counts one and two. Ordered: thirty days be given to file special pleas. Ordered to recognize personally. October 14—(3) Defendant's motion for particulars. October 15—(4) Defendant's motion to require commonwealth to furnish list of grand jury witnesses. (5) Defendant's motion to inspect minutes of grand jury.

1966 March 28—Endorsement on #3—Paragraphs 1, 2, 3, 4, 5 allowed as amended by the court. Paragraph 6 allowed. Paragraph 7—Denied. (Pillsbury, Justice) Endorsement on #4—Allowed by the court. (Pillsbury, Justice) April 7—List of Grand Jury witnesses—see 15127. (6) Particulars of the Commonwealth. (7) Motion to dismiss. April 8—Endorsement on #7—Motion denied. (Pillsbury, Justice) Endorsement on #5—Motion denied. (Pillsbury, Justice) April 15—Defendants' request for daily copy of transcript of evidence. Endorsement on defendants' request for daily copy of transcript of evidence. Motion allowed. (Pillsbury, Justice) April 21—Jury (with 15230) James C. Terret, Foreman. April 26—(8) Defendant's motion for directed verdict. April 27—Endorsement on #8—Motion allowed as to count two, denied as to count one. Defendant's exception saved as to count one. (Pillsbury, Justice) Verdict: Guilty under count one. April 28—(9) Defendant's motion under provisions of General Laws,

Chapter 279, Section 4 as amended. Endorsement on #9—Motion denied. (Pillsbury, Justice) (10) Defendant's motion under provisions of General Laws, Chapter 278, Section 30, requesting the court to report the case to the Supreme Judicial Court. Endorsement on #10—Motion allowed. (Pillsbury, Justice) (11) Defendant's renewal of motion for directed verdict and motion for new trial under provisions of General Laws Chapter 278, Section 11—Endorsement on #11—Motion denied. Defendant's exception saved. (Pillsbury, Justice) Sentence: Fine—$500. Execution of said sentence stayed pending a report to the Supreme Judicial Court with consent of defendant. July 29—(12) Report.

Copy.

Attest,

EDWARD G. SHEA
Clerk.

APPENDIX D

Statutes Involved

MASS. GEN. LAWS ANNOTATED:

C. 272, § 99

"§ 99. EAVESDROPPING.

Whoever, except in accordance with an order issued as provided herein, secretly or without the consent of either a sender or receiver, overhears, or attempts secretly, or without the consent of either a sender or receiver, to overhear, or to aid, authorize, employ, procure, or permit, or to have any other person secretly, or without the consent of either a sender or receiver, to overhear any spoken words at any place by using any electronic recording device, or a wireless tap or electronic tap, or however otherwise described, or any similar device or arrangement, or by tapping any wire to intercept telephone communications, shall be guilty of the crime of eavesdropping and shall be punished by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both.

Such order may be issued and shall be signed by any justice of the supreme judicial or superior court upon application of the attorney general or a district attorney for the district verified by his oath or affirmation that there are reasonable grounds to believe that evidence of crime may thus be obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may thus be obtained shall be final and not subject to review. Said order shall describe or identify (1) the purpose thereof; (2) the location of and the person or persons who are to be so overheard or whose communications are to be so intercepted if known;

(3) if telephone communications are to be so intercepted the telephone line if known; (4) the person or persons who are authorized to so overhear or intercept, or the person or persons under whose supervision such overhearing or interception is to be conducted.

In connection with the issuance of such an order, the justice may examine on oath the applicant and any other witness he may produce, for the purpose of satisfying himself of the existence of reasonable grounds to believe that evidence of crime may be thus obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may thus be obtained shall be final and not subject to review. Any such order shall be effective for the time specified therein, but not for a period of more than three months, unless extended or renewed by the justice who signed and issued the original order, upon satisfying himself that such extension or renewal is in the public interest. Any such order, together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for such interception or directing such overhearing or interception of the telephone communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained personally by the judge or justice issuing the same. In case of emergency and when no such justice is available, the attorney general or the district attorney for the district may issue such order, but within seventy-two hours thereafter the said attorney general or district attorney upon oath or affirmation setting forth all the facts, shall apply to a justice of the supreme judicial or superior court for a court order to issue validating the acts of said attorney general or district attorney. If the court refuses,

after hearing, to validate such prior order of the attorney general or district attorney, said prior order shall cease to be effective, and no further action thereunder may be taken."

C. 272, § 100

"§ 100. ACCESSORY TO EAVESDROPPING.

Whoever, except when authorized under section ninety-nine, for the purpose of eavesdropping as defined in section ninety-nine, either on his own account or as the servant or agent of another, permits or acquiesces in the installing of any electronic recording device or any similar device or arrangement, or the tapping of any wire, shall be punished by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both.".

C. 272, §101

"§ 101. PRIMA FACIE EVIDENCE OF EAVESDROPPING.

Proof of the installation in any building of any device or arrangement which may be used for the purpose of violating the provisions of section ninety-nine by listening to any spoken words or proof of the tapping of any wire, unless duly authorized and unless done with the consent of the owner or person in control of the building, shall be prima facie evidence of the commission of the crime of eavesdropping; but nothing contained in this section or sections ninety-nine and one hundred shall render it unlawful for any person to install and use such a device on premises under his exclusive control."

C. 278, § 30

"§ 30. REPORT. If, upon the trial of a person convicted in the superior court, a question of law arises,

which, in the opinion of the presiding justice, is so important or doubtful as to require the decision of the supreme judicial court, he shall, if the defendant desires or consents to it, report the case so far as necessary to present the question of law arising therein; and thereupon the case shall be continued to await the decision of the supreme judicial court."

APPENDIX E

Non-"Reported" Excerpts from Trial Evidence

(Excerpted from stenographic minutes of trial in Commonwealth v. Earl E. Jaycox, Bernard B. Spindel, Superior Court, Commonwealth of Massachusetts, Springfield, Mass., April 21-27, 1966, Ind. Nos. 15230, 15231, Trial Held Before Pillsbury, J., and a Jury;

pp 72, 73, 74, 75, 76, 77, 78, 79, 80, 119, 137, 138, 176, 179, 180, 181.)

* * * * *

(72) MR. WILLIAM THAL, sworn.

Direct examination by Mr. Greeley:

Q. Would you state your full name and home address, please? A. William Thal, 8 Overlook Rd., Scarsdale, New York.

* * * * *

Q. What is your occupation or profession? A. Textile executive.

Q. Do you have in the course of your occupation as a textile executive, do you have some connection with Alamac Knitting Mills? A. Yes, I am president now of the Alamac Knitting Mills.

Q. Who owns the majority stock in Alamac Knitting Mills? A. It is a family-held stock; one of the family is a majority holder.

Q. One of your family? A. One of our family, yes.

Q. Who runs for all practical purposes Alamac Knitting Mills? A. I do.

* * * * *

Appendix E—Non-"Reported" Excerpts from Trial Evidence

(73) Q. Directing your attention to the year 1962, Mr. Thal, did you at that time have either under contract or employed by Alamac the Dolan-Whitney Detective Service? A. Yes, we did.

Q. And in what capacity? A. Guard service, security.

* * * * *

(74) Q. Now, specifically, in 1952, was there a problem—I am sorry, 1962, was there a problem of pilferaging existing at the plant? (75) A. Yes, there was.

Q. Did you, as a result of that problem, have some occasion to confer with Mr. Dolan of the Dolan-Whitney Detective Service? A. Yes, I did. I called him about the subject.

* * * * *

Q. And will you give us the discussion, as best your memory can do? A. Well, at the time, our records indicated the thefts were growing excessively worse in bulk form rather than the smaller units that prior to that date had been taken out.

I advised Mr. Dolan of this fact and told him that something would have to be done or we might have to look elsewhere for security service.

Mr. Dolan notified me that he thinks we can do something about it. He would like to come down and discuss it with me. We made those arrangements. He came down to the office and we had a discussion.

* * * * *

Appendix E—Non-"Reported" Excerpts from Trial Evidence

(76) Q. So, following your telephone discussion with Mr. Dolan, he came to your plant? A. Yes, came to my office.

Q. And you, again, discussed the problem? A. That's correct.

Q. And will you give us, as best you can, the substance of the talk? A. Well, I pointed out the size of the theft that was going on. And, also, the fact that several of these larger packages had been found outside the fences, apparently, thrown over the fence, waiting for someone to pick it up. It was suggested, the best means of stopping this would be to find out who the outside contact is, and who the inside people are placing the fabric over the fence, and this could be done by tapping our phones.

After some discussion, we agreed. At least I agreed.

And I questioned Mr. Dolan about the legality of tapping these phones. And it was clearly (77) pointed out that they are on our own premises, our own telephones, and we are perfectly within our rights in doing so.

I gave him my approval, and then waited for results.

Q. Did you again have a discussion with Mr. Dolan subsequent to this one, relating to the problem, or did you have a discussion with somebody else? A. No, after that discussion I was told that someone would call on me and discuss this further.

Q. And how and by whom were you told that? A. By Mr. Dolan. He was to make the contact and have someone see me about making the installation.

Q. And following that notification, did you, in fact, meet somebody at your plant and discuss the problem? A. Yes, I did.

Appendix E—Non-"Reported" Excerpts from Trial Evidence

Q. And first of all, whom was it that you met? A. Well, Mr. Miller of the Dolan-Whitney Agency brought two gentlemen up; one was introduced as Mr. Spindel, and the other one I don't recall whether they used a name. He was introduced as a friend or an associate, something of that nature.

(78) Q. Where did you meet Mr. Spindel and this other gentleman? A. In my office at the plant.

Q. And you again discussed your problem? A. Yes. I pointed out the problem to him. And again I brought up the subject of legality, and again was told that on our own premises, on our own phones, this was perfectly legal, it was within the law.

Q. Was Mr. Miller present during this discussion? A. No, Mr. Miller was not. He made the introduction and left.

Q. Was the other gentleman present? A. The other two gentlemen were.

Q. The other two gentleman? A. Yes, Mr. Spindel and Mr. Jaycox.

Q. On the first meeting? A. Initial meeting, yes.

Q. And the third gentleman was unknown to you? A. That was Mr. Miller, who left.

Q. It is my understanding of your testimony, Mr. Thal, that when you first met Mr. Spindel, he was with a gentleman that you did not know, is that correct? A. That is correct.

Q. Now, I am asking about this meeting? (79) A. This meeting, the gentleman I did not know, who was not introduced by name, was Mr. Jaycox.

Q. I see. You, ultimately, found out— A. That is right.

Appendix E—Non-"Reported" Excerpts from Trial Evidence

Q. —that the gentleman you did not know was Mr. Jaycox? A. That's correct.

Q. So that, in your office there was three people at this time? A. Two, and I was the third. There was three of us there.

Q. And you discussed the problem? A. Yes, we did.

Q. And the means of solving the problem? A. Correct.

Q. Now, will you give us that discussion with reference to the means that you were going to use to solve this problem? A. Well, the point from which most of the theft originated was discussed by extension number or floor number, and it was agreed at the time that the four phones in that area would be tapped. They had my authorization to do so. And it would have to be done on a week-end when the plant was not in operation. This was also agreed. Entrance to the plant would be gained through the security guard at the gate and, (80) again, we agreed to that. And the gentleman went ahead with this.

* * * * *

(119) *Cross Examination by Mr. Donnellan:*

* * * * *

(137) Q. I think you said that you talked with Mr. Dolan on the original occasion about the legality of monitoring these phones? A. Yes, I did.

Q. And you were assured by Mr. Dolan that it was legal? A. That is right.

Q. And you were represented by counsel at that time, were you not? A. Yes, we were.

Q. Did you discuss the legality with your counsel? A. I believe we did, and the law was then looked up at the time.

Q. And the law was looked up for it? A. Yes.

Q. And were you assured by your counsel that it was legal? A. It was their opinion that this was legal, based on the laws written.

Q. I see. So that, when Mr. Spindel came out to talk with you, you had already received assurance that this was legal? A. That is correct.

Q. Did you talk with Mr. Spindel about the legality? (138) A. I did.

Q. And were you assured by him that it was legal at that time, too? A. I was. He confirmed me of this.

Q. Did he tell you that he had talked with counsel? A. I don't recall whether he did or not. But the assurance that it was legal, was there.

Q. But you don't recall whether he told you that or not? A. No, sir.

* * * * *

(176) *Redirect Examination by Mr. Greeley*:

* * * * *

(179) Q. And I think you told, either Mr. Keyes or Mr. Donnellan, that you discussed the legality of this installation with counsel? A. Yes, I did.

Q. And would you tell us what counsel's name was, please? A. Mr. Edward Cooley.

Q. And you discussed, generally, whether or not this installation was legal? A. That is correct.

* * * * *

Appendix E—Non-"Reported" Excerpts from Trial Evidence

By Mr. Greeley:

Q. First of all, when you discussed—it was with Mr. Cooley? A. That is correct.

Q. Was anybody else present? A. No, there was not.

Q. And will you tell us, as best as you can, what you asked Mr. Cooley and what Mr. Cooley told you? (180) A. Well, I asked him about the tapping of our phones on our property, whether that was legal. He referred to a law book and read that portion dealing with the law and indicated from that that it would seem rather hazy but it was his opinion that it was legal.

Q. Now, can you tell us whether or not you specified in detail the extent of the tapping? A. Well, the extent of our tapping, yes, sir, I told him we had the four extensions tapped plus my own two private phones on our own premises.

Q. And that was the full extent of your conversation with Mr. Cooley? A. That was.

(181) Q. And you had no other conversation with him subsequent to that? A. None.

Q. I'm not sure what you said to Mr. Keyes when he asked you if Mr. Spindel discussed it with counsel or whether Mr. Spindel told you that he discussed it with counsel? A. I wasn't sure of it, but I believe he had.

Q. Did he indicate to you the name of his counsel? A. No, sir.

* * * * *

SUPREME COURT, U. S.

FILED

JUL 29 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 290.

BERNARD B. SPINDEL,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

ELLIOT L. RICHARDSON,
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ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 290.

BERNARD B. SPINDEL,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at 1967 Mass. Adv. Sh. 199 and 223 N.E. 2d 511, and is set forth in Appendix A of the petitioner's Petition for Writ of Certiorari.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under 28 U.S. Code § 1257 (3).

Questions Presented.

Whether the language of Mass. G.L. c. 272, § 99 and § 101, as applied to the petitioner, meets the standards of

clarity and definiteness required by the due-process clause of the Fourteenth Amendment to the United States Constitution.

Constitutional Provisions and Statutes Involved.

The case involves the due-process clause of the Fourteenth Amendment of the United States Constitution. It also involves Mass. G.L. c. 272, §§ 99-101, as amended, and c. 278, § 20; these statutes are quoted in Appendix D of the petitioner's Petition for Writ of Certiorari.

Statement of the Case.

In 1962 Alamac Knitting Mills, Incorporated (Alamac), was engaged in the manufacture of textiles in Springfield. Alamac, employing some 800 people, occupied a large mill under a lease of the entire premises from the owner. Earlier in 1962 it was suspected that employees were pilfering finished materials, and William Thal, Alamac's chief executive officer, sought to ascertain the persons involved and how they operated. He communicated with his security officer (an independent contractor), and it was decided to tap telephones in the mill. At a meeting arranged between Thal and Spindel to carry out this decision, Thal authorized Spindel to place a wire tap on four telephones located in different parts of the mill. Thal also authorized Spindel to place in a desk exclusively used by Thal one or two wire or tape recorders so that conversations on the tapped phones could be recorded and monitored. Spindel completed the wiring and installation of equipment necessary for the telephone monitoring. Thereafter Thal recorded and monitored conversations emanating from the

tapped telephones. The four telephones involved were owned, installed and serviced by the New England Telephone Company and were used by various employees for outside calls as well as intraplant communication. Evidence was presented that employees involved did not consent to the monitoring of their telephone conversations. There was no evidence that any employee consented to such monitoring.

The jury were instructed that the word "device" appearing in the last clause of G.L. c. 272, § 101, as amended through St. 1956, c. 48, § 4, "referred to an electronic recording device, or a wireless tap or a similar device not involving tapping of a wire to intercept telephone communications" and that this clause did not apply to the tapping of a telephone wire. "The jury . . . [were] further instructed that proof of the tapping of any wire shall be prima facie evidence of the crime of eavesdropping, (1) unless duly authorized by a court order issued in accordance with section 99 and (2) unless done with the consent of the owner or person in control of the building." The jury found Spindel guilty of the crime of eavesdropping. Mass. G.L. c. 272, §§ 99-101, as amended.

The judge, at the *request of the defendant* (Petr.'s Appendix C, p. A13), reported the case to the Supreme Judicial Court of Massachusetts.

The questions reported were: "(1) Is it lawful to tap a wire to intercept telephone communications in a building when authorized by and done with the consent of the owner or persons in control of the building but without a court order issued in accordance with G.L. c. 272, § 99? (2) Does the language of G.L. c. 272, § 101, meet the standard of clarity and definiteness as the defendant in this case to satisfy the requirements of *Commonwealth* v. *Slome,* 321 Mass. 713 (1957)?"

The Supreme Judicial Court affirmed the judgment.

Argument.

1. The Supreme Court of the United States does not have jurisdiction to hear a case in which the alleged federal issue involved was not raised or decided in the State Court.

The petitioner invokes the jurisdiction of the Supreme Court to hear this case under 28 U.S. Code, § 1257 (3). However, it is well settled that, where the State Supreme Court did not pass on the question now urged, and where it does not appear to have been properly presented to that Court for decision, the Supreme Court is without jurisdiction to consider it in the first instance. *Congress of Industrial Organizations* v. *McAdory,* 325 U.S. 472, 477 (1945). See also *Shelley* v. *Kraemer,* 334 U.S. 1, 8-9 (1948); *Walters* v. *City of St. Louis,* 347 U.S. 231, 233 (1954); *Michel* v. *Louisiana,* 350 U.S. 91, 101 (1955); *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430, 433 (1940); and *Wilson* v. *Cook,* 327 U.S. 474, 482 (1946).

Moreover, defendant's counsel in a lobby conference with counsel for the Commonwealth and the Superior Court Justice hearing the case agreed to waive all assignments of error and other questions of law if the justice would report the case to the Supreme Judicial Court.

2. The language of Mass. G.L. c. 272, §§ 99-101, as applied to petitioner meets the standards of clarity and definiteness required by the due-process clause of the Fourteenth Amendment to the United States Constitution.

The Massachusetts Supreme Judicial Court has held that the statute is sufficiently definite in specifying the conduct that is inhibited so that a man of ordinary intelligence could ascertain whether any act of his will come within the

sweep of the statute, and that it was not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Commonwealth* v. *Spindel,* 1967 Mass. Adv. Sh. 199, at p. 203.

It is submitted that the construction given a statute by the State Court is conclusive of its scope and meaning. *Poulos* v. *New Hampshire,* 345 U.S. 395. *Fox* v. *Washington,* 236 U.S. 273.

3. Scienter is not in issue. Criminal scienter or intent is not in issue because the statute is *malum prohibitum* and not *malum in se.* Furthermore, it has long been held that ignorance of the law is no excuse. 1 Coke 177.

4. Petitioner here seeks to engage in such private conduct as is already forbidden to the states (*Berger* v. *New York,* U.S. S. Ct. October Term, 1966), and seeks to make constitutional acts which "constitute a great danger to the privacy of the individual;" thereby raising "grave constitutional questions under the Fourth and Fifth Amendment." Warren, C.J. in *Lopez* v. *United States,* 373 U.S. 427, at 441 (1963).

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari and motion for enlargement of the record should be denied.

ELLIOT L. RICHARDSON,
Attorney General,
ROBERT A. GREELEY,
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